

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ANGELA CASTELLANO,

Plaintiff,

v.

CHARTER COMMUNICATIONS, LLC
a Delaware limited liability company,

Defendant.

CASE NO. 3:12-cv-05845-RJB

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT, DENYING
PLAINTIFF'S MOTION TO STRIKE,
AND GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO STRIKE

This matter comes before the court on Defendant's Motion for Summary Judgment. Dkt. 25. The court has considered the relevant documents and the remainder of the file herein.

I. RELEVANT FACTS

Introduction. Plaintiff Angela Castellano brings this lawsuit against her former employer, Defendant Charter Communications, LLC. Dkt. 1. Castellano was diagnosed with multiple sclerosis (MS) while she was employed at Charter. Dkt. 26-1, at 52. Castellano now brings state law claims, alleging that Charter discriminated against her because of her disability;

ORDER GRANTING IN PART AND DENYING IN
PART DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT, DENYING PLAINTIFF'S MOTION
TO STRIKE, AND GRANTING IN PART AND
DENYING IN PART DEFENDANT'S MOTION
TO STRIKE- 1

1 failed to provide a reasonable accommodation or accessible work place; created a hostile work
 2 environment; retaliated against her; and wrongfully terminated her. Dkt. 1. She brings a federal
 3 law claim that Charter unlawfully interfered with her rights under the Family and Medical Leave
 4 Act (“FMLA”). *Id.*

5 ***Background/Pre-Diagnosis.*** Castellano began working for Charter in the early 2000s as
 6 a Retention Specialist at Charter’s Vancouver call center. Dkt. 26-1, at 9-12. During her
 7 employment, Castellano suffered symptoms resulting from MS, which was not diagnosed until
 8 May of 2010. Dkt. 26-1, at 24-25; Dkt. 26-1, at 37. Prior to diagnosis, Castellano requested leave
 9 on multiple occasions and Charter never denied her requests. Dkt. 26-1, at 24-25; Dkt. 26-1, at
 10 37.

11 Castellano also began experiencing financial difficulties during this time, filing for
 12 Chapter 13 bankruptcy on December 29, 2009.¹ Dkt. 27-1, at 3. In her bankruptcy schedules,
 13 Castellano indicated that she had no contingent or unliquidated claims of any nature. Dkt. 27-2,
 14 at 13. The bankruptcy court confirmed her bankruptcy plan on April 6, 2010. *Id.* at 4.

15 ***Diagnosis.*** On May 14, 2010, Castellano was diagnosed with MS by Dr. Edward Kim
 16 and Dr. Marlene Dietrich. Dkt. 32, at 3, 28. Following her diagnosis, Castellano and her doctors
 17 submitted Charter’s FMLA paperwork. Dkt. 26-1, at 53. Dr. Dietrich informed Charter that
 18 Castellano’s condition was permanent; that Charter should provide Castellano a comfortable
 19 chair; and that Castellano may need leave “at least” once every six months for doctor’s
 20 appointments but “maybe more often if symptoms worsen.” Dkt. 32, at 31. Dr. Dietrich noted
 21 that “[e]xacerbations are unpredictable” and that Castellano “may need up to one week off every

22 ¹ The court has taken judicial notice of Castellano’s Chapter 13 bankruptcy proceedings
 23 pursuant to Charter’s request. *See* Dkt. 27.

1 three months.” *Id.* The form shows that it was faxed first on June 29, 2010, and then “refaxed”
 2 on July 2, 2010, and again on July 6, 2010. *Id.*

3 ***Medical Leave.*** On July 13, 2010, a Charter representative requested that Castellano talk
 4 with her doctor because she had been absent more than her doctor had estimated. Dkt. 32, at 81.
 5 On July 19, 2010, Dr. Edward Kim then filled out an additional medical certification, which
 6 provided that Castellano’s condition “affects essential job functions, including typing, walking to
 7 meetings and other functions requiring extended walking.” Dkt. 32, at 37. “Overtime work
 8 demands may be a difficult stressor and challenge for her” and Castellano “should not be held to
 9 the same compliance standards as other employees.” Dkt. 32, at 38. Dr. Kim warned that leave
 10 “is difficult to predict as symptom/problem development may fluctuate, necessitating different
 11 time periods away from job.” *Id.* Dr. Kim estimated that Castellano may require medical leave
 12 once or twice per week, with each leave lasting anywhere from one day to two weeks. *Id.*

13 On August 12, 2010, Charter sent a fax to Dr. Kim asking Dr. Kim to clarify how much
 14 overtime Castellano could work on a weekly basis and how many weeks, months, or years that
 15 Castellano would require medical leave. Dkt. 32, at 36. Dr. Kim responded on August 19, 2010,
 16 informing Charter that his opinions regarding her ability to work each day are subjective. Dkt.
 17 32, at 39. Dr. Kim said, “It is difficult to be as specific as you request and I cannot directly
 18 quantify hours or days of need when the condition and symptoms may change or worsen due to a
 19 multitude of factors.” *Id.* Dr. Kim attempted to respond to Charter’s inquiries by reiterating that
 20 overtime appeared to be a difficult stressor for Castellano and that a set schedule would be
 21 preferred. *Id.* In response to Charter’s second clarification, Dr. Kim provided that “[i]t is not
 22 possible . . . to directly predict how many absences she may need for medical reasons in a week
 23 or a month . . . Some reasonable degree of flexibility and understanding is appropriate. Her need

1 for this accommodation may be indefinite, as her condition is a chronic lifelong neurologic
2 condition that is often progressive.” *Id.*

3 During this time, Castellano accumulated attendance “points” due to her absences despite
4 turning in Charter’s medical paperwork. Dkt. 26-1 at 52-53. Castellano feared that she would
5 lose her job because she had accumulated approximately seventeen points and employees were
6 usually fired after six points. Dkt. 26-1 at 53. Charter finally approved Dr. Kim’s latest
7 evaluation. *Id.* Charter then “backdated everything,” removing all but three of Castellano’s
8 attendance points. Dkt. 26-1, at 57-59.

9 ***Castellano Meets with HR.*** On January 20, 2011, Castellano met with Charter’s Human
10 Resources Generalist, Debbie Schofield, to discuss issues relating to Castellano’s medical leave.
11 Dkt. 32, at 5, 74. Charter’s Human Resources Director, Tom Rothengass, joined the conversation
12 and, according to Castellano, she had the following exchange with him:

13 He says, “Are your doctors real doctors?” . . . And then he says, “What are you
14 still doing here?” And I said I wanted to continue to use my brain and walk. And
15 he said to me, “You have a sidewalk in front of your house. Why don’t you walk
16 out there.” And then he says, “Also, you still drive. Why don’t you go to a park,
17 walk around there. I recommend you do anything, but continue working here.
Don’t make me make that choice for you.” And then he says, “What’s the
18 difference between MS and cancer?” And I said, “I don’t know. Maybe I’ll live. I
19 don’t know.”

20 Dkt. 26-1, at 64-65. Schofield then had Castellano sign an agreement titled “Understanding of
21 Providing Appropriate and Timely Documentation,” to which Castellano objected because of the
22 strict deadlines the document imposed on her doctors. Dkt. 32 at 6, 71. The form was not a form
23 that all employees had to sign, but, according to Castellano, she was required to sign the form
24 before Charter would discuss her accommodation needs. Dkt. 32, at 6.

1 Castellano claims that Rothengass' treatment of her was so bad that she did not want to
 2 come to work. Dkt. 32, at 8. Castellano went home in tears after the meeting. Dkt. 32, at 6-7. On
 3 January 25, 2011, Castellano filed a formal complaint against Rothengass for his behavior. Dkt.
 4 32, at 6. A Human Resources employee from Charter's corporate office followed up on the
 5 complaint, directing the call center not to use the "Understanding of Providing Appropriate and
 6 Timely Documentation" form and recommending disciplinary action for Rothengass due to his
 7 comments. Dkt. 32, at 77. There is no elaboration in the record on the type of disciplinary action
 8 recommended.

9 Castellano's doctor ordered her to take one month of leave because of the stress from the
 10 claimed intimidation and harassment, which Charter granted. Dkt. 32, at 8; Dkt. 26-1, at 66.

11 ***Castellano's Return From Leave.*** After Castellano returned from leave in late February,
 12 Castellano did not receive wages for four weeks because Charter's deductions for health
 13 insurance coverage exceeded her paycheck. Dkt. 32, at 10; Dkt. 26-1, at 67. Castellano went to
 14 Human Resources and Charter resolved the issue by crediting her on future paychecks. Dkt. 32,
 15 at 10; Dkt. 26-1, at 67.

16 Castellano also encountered workstation issues relating to her ability to print documents.
 17 *Id.* Rothengass was terminated about three days after Castellano returned from her month of
 18 leave. Dkt. 32, at 8; Dkt. 25, at 8. According to Charter, Rothengass' termination was due "in
 19 part" to the incident about which Castellano had complained. Dkt. 26-1, at 74.

20 ***Performance Evaluation.*** On April 22, 2011, Castellano received her 2010 performance
 21 evaluation. Dkt. 32, at 2. As of 2009, Castellano's performance ratings all met or exceeded
 22 performance standards. *Id.* 2010 marked the first year in which Castellano received a poor

23 performance evaluation; she received a "D" for "Does Not Meet Performance Expectations" in
 24 ORDER GRANTING IN PART AND DENYING IN
 PART DEFENDANT'S MOTION FOR SUMMARY
 JUDGMENT, DENYING PLAINTIFF'S MOTION
 TO STRIKE, AND GRANTING IN PART AND
 DENYING IN PART DEFENDANT'S MOTION
 TO STRIKE- 5

1 “Compliance” and “Average Handle Time.” *Id.* Castellano claims that her bonus was reduced
 2 because of this evaluation. *Id.* Castellano also claims that two non-disabled employees with
 3 performance issues received higher bonuses. Dkt. 32, at 3.

4 ***June through December of 2011.*** In June of 2011, Castellano filed an FMLA form with
 5 Charter, further documenting her need for an ergonomically appropriate chair and for extra time
 6 to walk between meetings. Dkt. 32, at 54. Dr. Dietrich also said that Castellano “needs
 7 handicapped accessible doorways!” *Id.*

8 On July 26, 2011, as Castellano exited the building during a fire drill, she heard an
 9 employee behind her say, “Uh-Oh, we’re going to burn.” Dkt. 26-1, at 60. Castellano mentioned
 10 the comment to a co-worker, who then reported it. Dkt. 26-1, at 61. Charter followed up with
 11 Castellano but Castellano did not know who had made the statement. *Id.*

12 On September 15, 2011, Charter had a team meeting in which Management passed out
 13 customer compliments to everyone except for Castellano. Dkt. 32, at 11. According to
 14 Castellano, she had received customer compliments that Charter could have shared. *Id.*

15 On September 21, 2011, Castellano’s new supervisor criticized Castellano for working
 16 during her break. Dkt. 32, at 12. Castellano testified that “[i]n all ten years that I was there, I
 17 never had that happen.” *Id.*

18 On September 22, 2011, Castellano’s supervisor announced at the start of a meeting that
 19 Castellano would need to leave two minutes early because of how long it takes Castellano to get
 20 back to her seat. Dkt. 32, at 12. Castellano felt humiliated. *Id.* With two minutes left in the
 21 meeting, the supervisor again announced in front of everyone that Castellano needed to leave. *Id.*
 22 The same thing happened at a meeting on September 28, 2011. *Id.* On the following day

23 Castellano complained to HR but was told to discuss the issue with her supervisor. Dkt. 26-1, at
 24 ORDER GRANTING IN PART AND DENYING IN
 PART DEFENDANT’S MOTION FOR SUMMARY
 JUDGMENT, DENYING PLAINTIFF’S MOTION
 TO STRIKE, AND GRANTING IN PART AND
 DENYING IN PART DEFENDANT’S MOTION
 TO STRIKE- 6

1 13. The supervisor's solution was to dismiss everyone two minutes early. *Id.* Castellano again
2 felt humiliated and mocked. *Id.*

3 On October 19, 2011, Castellano was not allowed to keep a 6-inch fan on her desk
4 without a note from her doctor. Dkt. 32, at 13.

5 On October 27, 2011, Castellano's chair malfunctioned when she sat down. Dkt. 32, at 13.
6 Castellano could not get out of the chair without assistance. *Id.*

7 On October 29, 2011, Dr. Dietrich completed another health provider questionnaire that
8 reiterated Castellano's need for handicapped accessible doorways and an ergonomically
9 appropriate chair, along with a small fan for her desk and a water bottle. Dkt. 32 at 56.

10 On November 23, 2011, Castellano's chair again malfunctioned and Castellano fell to the
11 ground. Dkt. 32, at 14.

12 In December 2011, Castellano was disciplined because she had exceeded the number of
13 absences per week prescribed under the approved intermittent leave accommodation. Dkt. 26-1,
14 at 80. Castellano challenged the corrective action and Charter rescinded it. *Id.*

15 ***Castellano Leaves Charter.*** Castellano claims that she reached a point where she could
16 no longer perform her job because of the lack of accommodation and harassment. Dkt. 32, at 14.
17 She claims that the hostile environment heightened the symptoms of her condition. *Id.* The last
18 day on which Castellano worked for Charter was January 17, 2012. Dkt. 26-1, at 91-92. On
19 January 20, 2012, Castellano submitted a written letter of resignation, indicating that her
20 resignation was "due to stress and medical." Dkt. 26-7, at 2.

21 On January 24, 2012, Liberty Mutual, the third-party administrator of Charter's Short
22 Term Disability Plan, sent Castellano a letter approving her claim for benefits "based on [her]
23 inability to perform the duties of [her] job." Dkt. 26-8, at 2. In February of 2012, a Charter
24 ORDER GRANTING IN PART AND DENYING IN
PART DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT, DENYING PLAINTIFF'S MOTION
TO STRIKE, AND GRANTING IN PART AND
DENYING IN PART DEFENDANT'S MOTION
TO STRIKE- 7

1 representative sent an e-mail to Castellano, stating that “Charter remains committed to working
 2 to accommodate [Castellano’s] medical condition.” Dkt. 26-1, at 95. In response, Castellano
 3 testified that she could never feel comfortable about returning to Charter. Dkt. 26-1, at 95-96.
 4 Castellano claims that Charter never reached out to her with additional information about
 5 continuing to work before or after she left employment. Dkt. 32, at 14. Castellano further claims
 6 that she did not receive any notices or information about open positions or positions that she was
 7 qualified to perform. *Id.*

8 II. PROCEDURAL HISTORY

9 On March 16, 2011, Castellano filed a charge of discrimination with the EEOC. Dkt. 26-
 10 9, at 2. On May 9, 2013, the EEOC closed its file on Castellano’s charge and issued her notice of
 11 right to sue. Dkt. 26-10, at 2.

12 On September 20, 2012, Castellano filed the instant lawsuit in this Court. Dkt. 1. Charter
 13 filed this motion for summary judgment on October 8, 2013, arguing that all of Castellano’s
 14 claims are meritless. Dkt. 25. Castellano filed a response on October 28, 2013, and moved to
 15 strike e-mails attached to Charter’s declaration on grounds of hearsay, foundation and the
 16 collateral source rule. Dkt. 28. Charter filed its reply on November 1, 2013, responding to the
 17 merits of Castellano’s response, responding to Castellano’s motion to strike, and also moving to
 18 strike certain declarations filed by Castellano with her response. Dkt. 33.

19 III. STATEMENT OF THE ISSUES

20 There are seven issues before the court. The court must decide (1) whether to strike
 21 declarations and exhibits from Castellano’s response and Charter’s reply; (2) whether judicial
 22 estoppel bars Castellano’s claims; and whether to grant summary judgment against Castellano on

(3) her hostile work environment claim, (4) her disparate treatment claim, (5) her reasonable accommodation claim, (6) her retaliation claim, and/or (7) her FMLA interference claim.

IV. MOTIONS TO STRIKE

In her response, Castellano moved to strike e-mails attached to Charter's counsel's declaration on grounds of hearsay and lack of foundation, any declarations offered by Charter in its reply, and any reference to disability payments that Castellano has received. Dkt. 28, at 2. Castellano's motion should be denied. The court has noted Castellano's objections and will accord Charter's counsel's declaration the appropriate weight. Regardless, the court has not relied on the e-mails in its analysis. Also, Charter also did not offer any declarations in its reply. And, finally, for the purposes of this summary judgment motion the court has not considered or referenced any disability payments Castellano may have received.

In its reply, Charter moved to strike the following: the declarations of Stanley Horak, Kristen Dillenburg, and Angela Castellano to the extent they offer improper opinion testimony on legal conclusions; the declaration of Dillenburg because she was not disclosed in either Castellano's initial disclosures or her discovery responses; various portions of these declarations "because they lack foundation, personal knowledge, or are speculative, offer improper opinion, and/or constitute hearsay"; certain paragraphs of the Castellano declaration that are inconsistent with her deposition testimony; and Castellano's statements that are unsupported by the record. Dkt. 33, at 3-4.

Charter's motion to strike Horak's and Castellano's declarations is denied. The court has noted these objections, as well as the relevance of these items, and the court will accord them the proper weight. The court has distinguished and disregarded Horak's legal opinions but has taken

1 note of the authority he cited. The court also notes the objections regarding Castellano's
 2 declaration and will accord it the proper weight.

3 Charter also moved to strike Dillenburg's declaration. Castellano has not filed a surreply.
 4 For the purposes of this summary judgment, Dillenburg's declaration should be stricken. *See*
 5 Fed. R. Civ. P. 37.

6 V. DISCUSSION

7 A. **Legal Standard on Summary Judgment**

8 Summary judgment is proper only if the pleadings, the discovery and disclosure materials
 9 on file, and any affidavits show that there is no genuine issue as to any material fact and that the
 10 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is
 11 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient
 12 showing on an essential element of a claim in the case on which the nonmoving party has the
 13 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of
 14 fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for
 15 the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
 16 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some
 17 metaphysical doubt."). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a
 18 material fact exists if there is sufficient evidence supporting the claimed factual dispute,
 19 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby,*
 20 *Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors*
 21 *Association*, 809 F.2d 626, 630 (9th Cir. 1987). "[A]t summary judgment, the judge must view
 22 the evidence in the light most favorable to the nonmoving party." *T.W. Elect. Service Inc.*, 809
 23 F.2d at 630.

24 ORDER GRANTING IN PART AND DENYING IN
 PART DEFENDANT'S MOTION FOR SUMMARY
 JUDGMENT, DENYING PLAINTIFF'S MOTION
 TO STRIKE, AND GRANTING IN PART AND
 DENYING IN PART DEFENDANT'S MOTION
 TO STRIKE- 10

B. Castellano's Claims Not Barred by Judicial Estoppel

Charter argues that Castellano's claims are barred by the doctrine of judicial estoppel because Castellano never declared her potential claims as an asset in her ongoing bankruptcy proceeding. Dkt. 25, at 13-15. Thus, the issues before the court are, first, whether Castellano had a duty to disclose her disability discrimination claims in her bankruptcy, and, if so, whether Castellano's failure to do so bars her claim under the doctrine of judicial estoppel.

"In the bankruptcy context, a party is judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (citing *Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F.2d 555, 557 (9th Cir.1992)). "[I]f the debtor has enough information . . . prior to confirmation to suggest that it may have a possible cause of action, then that is a known cause of action such that it must be disclosed." *Id.* quoting (*In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999)).

Castellano has raised an issue of fact sufficient to preclude summary judgment by pointing out that her claims against Charter did not arise until after she had filed for bankruptcy. Castellano's bankruptcy plan was confirmed on April 6, 2010, and her claims did not arise until after she was diagnosed with MS in May of 2010. Dkt. 27-1, at 4; Dkt. 32, at 3. Castellano did not have a duty to disclose her discrimination claims in her initial reorganization plan or debtor's schedules because she was, at that time, unaware of her potential discrimination claims. For the same reason, Castellano did not have a duty to amend her plan after confirmation to include her claims against Charter. *See Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 910-11, 28 P.3d 832 (2001).

1 These facts prevent the doctrine of judicial estoppel from barring Castellano's claims.
 2 Charter relies on *Hamilton* to argue that Castellano's duty to disclose potential claims continued
 3 for the duration of the bankruptcy proceeding. Dkt. 33, at 5 (citing 270 F.3d at 782). However,
 4 *Hamilton* posits that judicial estoppel is only proper when the plaintiff had knowledge of claims
 5 prior to the bankruptcy plan's confirmation. The plaintiff in *Hamilton* actually threatened
 6 litigation before filing for bankruptcy. *Hamilton*, 270 F.3d at 781.

7 Not one of the cases cited by Charter involved claims that arose after the bankruptcy
 8 plan's confirmation, as they did in the case at hand. *See Hamilton*, 270 F.3d at 781 (plaintiff filed
 9 for bankruptcy after threatening litigation); *In re Coastal Plains, Inc.*, 179 F.3d 197 (plaintiff
 10 filed suit one week after filing for bankruptcy, and plaintiff's claims arose out of the business
 11 dispute that caused the bankruptcy); *Hay*, 978 F.2d at 557 (plaintiff "learned of the facts that led
 12 to the discovery of [plaintiff's] claims sometime during the month preceding the month in which
 13 [plaintiff's] reorganization plan was confirmed."); *Allers-Petrus v. Columbia Recovery Grp.*,
 14 *LLC*, 2009 WL 1160061 (W.D. Wash. Apr. 29, 2009) (plaintiff filed suit in September of 2008
 15 and the bankruptcy plan was confirmed in November of 2008); *Love v. Tyson Foods, Inc.*, 677
 16 F.3d 258, 260-61 (5th Cir. 2012) (plaintiff filed suit in May of 2008 and the bankruptcy plan was
 17 confirmed in September of 2008); *Balthrope v. Sacramento County HHS*, 398 Fed. Appx. 285
 18 (9th Cir. 2010) (court relied on *Hamilton* to apply judicial estoppel but the opinion contains
 19 insufficient information to determine when the dismissed claims arose).

20 Accordingly, the doctrine of judicial estoppel should not bar Castellano's claims against
 21 Charter.

22 **C. Issues of Fact Preclude Dismissing Castellano's Hostile Work Environment Claim**

23
 24 ORDER GRANTING IN PART AND DENYING IN
 PART DEFENDANT'S MOTION FOR SUMMARY
 JUDGMENT, DENYING PLAINTIFF'S MOTION
 TO STRIKE, AND GRANTING IN PART AND
 DENYING IN PART DEFENDANT'S MOTION
 TO STRIKE- 12

1 Charter argues that Castellano's hostile work environment claim does not meet the
 2 required elements. Castellano must prove the following: (1) that she was disabled within the
 3 meaning of RCW 49.60.180; (2) that the harassment was unwelcome; (3) that it was because of
 4 the disability; (4) that it affected the terms or conditions of employment; and (5) that it was
 5 imputable to the employer. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 44-45 (2002). Charter does
 6 not dispute the first, second or third elements. Instead, Charter argues that the harassment was
 7 not severe enough to alter the conditions of her employment. Dkt. 25, at 20. Alternatively,
 8 Charter argues that any harassment was not imputable to Charter. Dkt. 25, at 20-21.

9 As for the severity of the harassment, "a satisfactory finding on this element should
 10 indicate '[t]hat the conduct or language complained of was so offensive or pervasive that it could
 11 reasonably be expected to alter the conditions of plaintiff's employment.'" *Robel*, 148 Wn.2d at
 12 46 (quoting 6A WASH. PRAC., *Wash. Pattern Jury Instr. Civ.* WPI 330). Castellano has raised
 13 issues of fact that preclude finding against her on this element. Charter itself identified multiple
 14 instances of humiliation that, contrary to its argument, raise an issue of fact as to whether the
 15 harassment was severe enough to alter the conditions of Castellano's employment. The exchange
 16 between Rothengass and Castellano is one such instance. Castellano went home in tears
 17 afterwards and her doctors ordered her to take one month of leave due to the claimed harassment
 18 and humiliation. Castellano has met her burden in raising an issue of fact as to this element of a
 19 hostile work environment claim.

20 As for whether the harassment is imputable to Charter, Castellano has raised multiple
 21 issues of fact. In applying the fifth element, "the jury must find either that (1) 'an owner,
 22 manager, partner or corporate officer personally participate[d] in the harassment' or that (2) 'the
 23 employer . . . authorized, knew, or should have known of the harassment and . . . failed to take
 24 ORDER GRANTING IN PART AND DENYING IN
 PART DEFENDANT'S MOTION FOR SUMMARY
 JUDGMENT, DENYING PLAINTIFF'S MOTION
 TO STRIKE, AND GRANTING IN PART AND
 DENYING IN PART DEFENDANT'S MOTION
 TO STRIKE- 13

1 reasonably prompt and adequate corrective action.” *Robel*, 148 Wn.2d at 47 (quoting *Glasgow*
 2 *v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 407 (1985)).

3 An issue of fact exists as to whether Rothengass was a manager. As the Director of
 4 Human Resources, a rational trier of fact could find that Rothengass had the authority to affect
 5 Castellano’s wages, hours, and working conditions, which would be sufficient to establish
 6 Rothengass as a manager. *See Robel*, 148 Wn.2d at 48 n.5. After all, Castellano reported to
 7 Human Resources whenever she had issues regarding her wages, hours, or working conditions.

8 There are also issues of fact as to the adequacy and promptness of Charter’s corrective
 9 actions. Charter asserts that its termination of Rothengass in itself defeats Castellano’s claim of
 10 harassment. However, Castellano has raised an issue of fact as to whether Rothengass was
 11 terminated “promptly” and whether his termination was even a corrective action. Rothengass
 12 remained employed when and after Castellano returned to work, which was more than a month
 13 after the incident. In addition, Charter’s investigation into the incident did not suggest
 14 Rothengass be terminated, and Charter itself denied to Castellano that the termination was solely
 15 a result of Castellano’s complaint. *See Dkt. 26-1*, at 74.

16 These issues of fact preclude granting summary judgment in Charter’s favor.

17 **D. Issues of Fact Preclude Summary Judgment on Castellano’s Disparate Treatment**

18 **Disability Claim**

19 Charter also argues for summary judgment on Castellano’s disparate treatment disability
 20 claim. *Dkt. 25*, at 15-18. To survive summary judgment, Castellano must set forth a *prima facie*
 21 case of discrimination. *Id.* A *prima facie* case requires Castellano to prove that (1) she has a
 22 disability, (2) she suffered an adverse employment action because of her disability, (3) she did
 23 satisfactory work prior to the adverse employment action, and that (4) she was replaced by a

24 ORDER GRANTING IN PART AND DENYING IN
 PART DEFENDANT’S MOTION FOR SUMMARY
 JUDGMENT, DENYING PLAINTIFF’S MOTION
 TO STRIKE, AND GRANTING IN PART AND
 DENYING IN PART DEFENDANT’S MOTION
 TO STRIKE- 14

1 non-disabled person. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 150 (2004); *Cluff v. CMX Corp.*
 2 *Inc.*, 84 Wn. App. 634, 638, 929 P.2d 1136 (1997). If the employee meets the burden of
 3 establishing a *prima facie* case, the burden of proof shifts to the employer to produce a
 4 legitimate, nondiscriminatory explanation for the adverse employment action. *Riehl*, 152 Wn.2d
 5 at 150. The ultimate burden then shifts back to the employer to prove that the employee's stated
 6 reasons are in fact pretext for discriminatory intent. *Id.* (citing *Hill v. BCTI Income Fund-I*, 144
 7 Wn.2d 172, 182 (2001)).

8 Issues of fact prevent finding against Castellano on her *prima facie* case. First, Charter
 9 does not dispute that Castellano has a disability. As to the second element, Castellano testified
 10 that she was harassed to the point of resigning from Charter, and she provided evidence that
 11 Charter's Human Resources director asked her to resign because of her disability. Moreover, a
 12 hostile work environment can amount to an adverse employment action, and thus the issues of
 13 fact regarding Castellano's hostile work environment claim also preclude summary judgment on
 14 Castellano's disparate treatment claim. *See Robel*, 148 Wn.2d at 74 n.24.

15 Third, Castellano received all positive performance reviews up until 2010, the year in
 16 which she alleges the harassment and disparate treatment began. This indicates satisfactory job
 17 performance up until that point. It remains an issue of fact as to whether Castellano performed
 18 her job adequately enough from May 2010 through 2012 to satisfy the third element. There is
 19 sufficient evidence for a rational trier of fact to conclude that any unsatisfactory performance
 20 was only a result of Charter's discrimination, hostile work environment, and/or lack of
 21 accommodation.

22 Fourth, the evidence is inconclusive as to whether Castellano was replaced by a non-
 23 disabled person. However, relevant federal cases may be looked to for guidance in construing
 24 ORDER GRANTING IN PART AND DENYING IN
 PART DEFENDANT'S MOTION FOR SUMMARY
 JUDGMENT, DENYING PLAINTIFF'S MOTION
 TO STRIKE, AND GRANTING IN PART AND
 DENYING IN PART DEFENDANT'S MOTION
 TO STRIKE- 15

1 and applying Washington's antidiscrimination laws. *See Dean v. Municipality of Metro. Seattle-*
 2 *Metro*, 104 Wn.2d 627, 636 (1985) (citing *Glasgow v. Georgia Pac. Corp.*, 103 Wn.2d 401
 3 (1985)). In Title VII cases, the fourth element of a *prima facie* case of discrimination may be
 4 satisfied by evidence that similarly situated non-protected employees were treated more
 5 favorably. *See Tuttle v. Metro. Gov't of Nashville*, 474 F.3d 307, 317 (6th Cir. 2007). Indeed, in
 6 its motion for summary judgment Charter states that the fourth element of a *prima facie* case
 7 requires the following: "[Plaintiff] was treated less favorably than an individual without a
 8 disability." Dkt. 25, at 15. Castellano's evidence points to multiple instances where she was
 9 treated less favorably as a disabled employee, such as being required to fill out the
 10 "Understanding of Providing Appropriate and Timely Documentation" form. Moreover,
 11 evidence suggests that Rothengass demonstrated hostility towards Castellano because of her
 12 disability, and asked her to resign because of her disability. These instances raise an issue of fact
 13 as to the fourth and final element of a *prima facie* case.

14 Accordingly, Castellano has provided evidence raising issues of fact regarding her *prima*
 15 *facie* case. Furthermore, assuming Charter can prove its adverse employment actions were
 16 nondiscriminatory, Castellano's evidence provides sufficient grounds for a rational trier of fact to
 17 find pretext. Rothengass' actions were directly related to Castellano's disability and seemed to be
 18 fueled by his frustration with her disability. In addition, all of Castellano's claims of
 19 discrimination arose after she was diagnosed with MS and relate to her requests for medical
 20 leave and disability accommodations. When viewed in the light most favorable to Castellano, the
 21 evidence is sufficient to show pretext for the purposes of precluding summary judgment.
 22 Therefore, Charter's motion for summary judgment on Castellano's disparate treatment claim
 23 should be denied.

24 ORDER GRANTING IN PART AND DENYING IN
 PART DEFENDANT'S MOTION FOR SUMMARY
 JUDGMENT, DENYING PLAINTIFF'S MOTION
 TO STRIKE, AND GRANTING IN PART AND
 DENYING IN PART DEFENDANT'S MOTION
 TO STRIKE- 16

E. Issues of Fact Preclude Summary Judgment on Castellano's Failure to Accommodate Claim

Charter argues that Castellano's failure to accommodate claim fails as a matter of law because Castellano was not a qualified to perform the essential functions of her position, Charter met its duty to provide reasonable accommodation, and because Castellano did not cooperate in the interactive process. Dkt. 25, at 18-20.

To survive summary judgment, Castellano must prove (1) that she had a disability; (2) that she was qualified to perform the essential functions of her job; (3) that she gave notice to Charter of her disability; and (4) that the employer failed to affirmatively adopt measures that were available to the employer and medically necessary to accommodate the disability. *Riehl v. Foodmaker, Inc.*, 152 Wash.2d 138, 145 (2004) (*quoting Hill*, 144 Wn.2d at 192-93). "Generally, the best way for the employer and employee to determine a reasonable accommodation is through a flexible, interactive process." *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 779, 249 P.3d 1044 (2011) (citing RCW 49.60.040(7)(d)).

Charter only disputes elements two and four. Dkt. 25, at 19-20. As to the second element, Castellano was qualified to perform the essential functions of her job prior to diagnosis, proven by her positive performance reviews up until that point. In addition, a rational trier of fact could conclude that any unsatisfactory performance even after diagnosis was a result of Charter's discrimination, hostile work environment, and lack of accommodation.

In regards to the fourth element, Castellano's doctors recommended and Castellano requested handicap accessible doorways and an ergonomically appropriate chair. Charter failed to accommodate both requests. Castellano also requested a parking spot near the entryway, which Charter denied despite Castellano's medical reports documenting her impaired mobility.

Dkt. 32, at 10. Castellano also testified that Charter ignored her doctor's recommendations that Charter space out their meetings. Dkt. 32, at 10.

Castellano has also raised an issue of fact as to Charter's commitment to the interactive process. Castellano and her doctors repeatedly submitted medical certifications noting the unpredictability of Castellano's condition. Nonetheless, Charter repeatedly required more documentation and clarification regarding her disability and her requested accommodations.

Summary judgment on Castellano's accommodation claim should not be granted.

F. Castellano's Retaliation Claim Survives Summary Judgment.

Charter argues that Castellano is unable to meet the essential elements of a retaliation claim, and that it is entitled to summary judgment because Castellano did not specifically address retaliation in her response. Dkt. 25, at 23; Dkt. 33, at 13. To establish a retaliatory discharge claim, Castellano must prove that: (1) she engaged in statutorily protected activity; (2) an adverse employment action was taken; and (3) there is a causal link between the activity and the adverse action. *Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002) (citing *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 861-62, 991 P.2d 1182 (2000)). The burden shifting scheme is the same as with discrimination claims. *Id.* Satisfying these elements sets forth a *prima facie* case of discrimination, and the burden then shifts to the employer to show that it acted on a legitimate, nondiscriminatory basis for its actions. *Id.* If satisfied, the ultimate burden shifts back to the employee to establish pretext. *Id.*

First, RCW 49.60.210 provides that it is unfair practice for an employer to discharge or discriminate against any person because she has opposed discrimination. Thus, by filing a complaint against Rothengass for a "hostile work environment," Castellano engaged in a

1 statutorily protected activity sufficient to satisfy the first element of a *prima facie* case. *See*. Dkt.
2 32, at 73.

3 Second, it has already been established that an issue of fact remains as to whether there
4 was an adverse employment action. Finally, in light of the relation between the potential adverse
5 employment action and Castellano's disability, issues of fact remain as to the link between the
6 statutorily protected activity, Castellano's disability, and her termination from employment.

7 The above pretextual analysis applies again, precluding summary judgment even if
8 Charter is able to establish a nondiscriminatory reason for the adverse employment action. The
9 alleged discrimination occurred after Castellano's diagnosis and related directly to her disability.
10 Castellano also no longer works at Charter and provides evidence of harassment and
11 discrimination that may have contributed to the termination of her employment. For these
12 reasons, Castellano has provided sufficient evidence to survive summary judgment on her
13 retaliation claim.

14 Charter argued in its reply that summary judgment should be granted on Castellano's
15 retaliation claim because she did not provide "any response." Castellano's evidence and
16 arguments are sufficient to preclude summary judgment, as the above analysis indicates.

17 **G. Summary Judgment Should be Granted on Castellano's FMLA Interference Claim**

18 Charter argues that there is no evidence that it violated Castellano's FMLA rights. Dkt.
19 25, at 25. The FMLA provides job security to employees who must be absent from work because
20 of their own illnesses, to care for family members who are ill, or to care for new babies. *Bailey v.*
21 *Southwest Gas Co.*, 275 F.3d 1181, 1185 (9th Cir. 2002). It is unlawful for an employer to
22 interfere with, restrain, or deny an employee's exercise of FMLA rights. *Id.*; 29 USC §

23 2615(a)(1). The necessary elements of a FMLA interference claim are: 1) an entitlement to
24 ORDER GRANTING IN PART AND DENYING IN
PART DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT, DENYING PLAINTIFF'S MOTION
TO STRIKE, AND GRANTING IN PART AND
DENYING IN PART DEFENDANT'S MOTION
TO STRIKE- 19

1 FMLA leave; 2) an adverse action by plaintiff's employer, which interfered with plaintiff's right
 2 to take FMLA leave; and 3) a showing that the employer's adverse action was related to the
 3 exercise, or attempt to exercise, FMLA rights. *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112,
 4 1124-26 (9th Cir 2001). Courts have been reluctant to read the FMLA as allowing unscheduled
 5 and unpredictable, but cumulatively substantial, absences. See *Collins v. NTN-Bower Corp.*, 272
 6 F.3d 1006, 1007 (7th Cir. 2001); *Mauder v. Metropolitan Transit Authority*, 446 F.3d 574 (5th
 7 Cir. 2006).

8 Here, Charter does not dispute the first element.. Instead, Charter argues that it did not
 9 interfere with Castellano's FMLA leave. Castellano argues that Charter interfered by creating
 10 "insurmountable paperwork deadlines," "losing her paperwork, requiring clarifications that were
 11 not needed, and repeating unnecessary paperwork after her diagnosis was permanent." Dkt. 28,
 12 at 16. However, Castellano has not provided evidence showing that Charter's paperwork
 13 deadlines were actually insurmountable or that Charter lost Castellano's paperwork. Even
 14 assuming Castellano had proved these claims, Castellano has not shown sufficient interference
 15 with her FMLA rights. Charter is allowed to seek clarification and authentication of medical
 16 certification. See 29 C.F.R. § 825.307. And, most notably, Charter never denied Castellano leave
 17 while they were seeking this clarification and authentication. Castellano has not produced
 18 sufficient evidence to proceed on the second element of her FMLA interference claim. For that
 19 reason, summary judgment should be granted on Castellano's FMLA interference claim.

20 **H. Conclusion**

21 Castellano's claims should not be barred by judicial estoppel. Summary judgment as to
 22 Castellano's hostile work environment claim, disparate treatment claim, failure to accommodate
 23

claim, and retaliation claim should be denied. Summary judgment as to Castellano's FMLA interference claim should be granted.

VI. ORDER

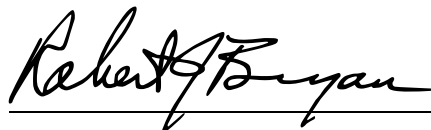
Therefore, it is hereby

ORDERED that Defendant's Motion for Summary Judgment (Dkt. 25) is **GRANTED IN PART** and **DENIED IN PART**: Defendant's motion for summary judgment on Plaintiff's hostile work environment claim, disparate treatment claim, reasonable accommodation claim, and retaliation claim is **DENIED**. Defendant's motion for summary judgment on Plaintiff's FMLA interference claim is **GRANTED**.

Plaintiff's Motion to Strike (Dkt. 28) is **DENIED**. Defendant's Motion to Strike (Dkt. 33) is **GRANTED IN PART** and **DENIED IN PART**: Defendant's motion to strike the declarations of Stanley Horak and Angela Castellano is **DENIED**. Defendant's motion to strike the declaration of Kristin Dillenburg (Dkt. 29) is **stricken to the extent stated above**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 19th day of November, 2013.



ROBERT J. BRYAN
United States District Judge